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## THE LAW OF ESCAPE IN CIVIL ACTIONS.

(*Concluded from the August No., ante, p.* 486.)

### V. Defences.

1. *In general.*—If the escape was without the consent of the sheriff or other officer, it will be a good defence to any action therefor that before the commencement of such suit such prisoner voluntarily returned to the jail from which he had escaped, or to the liberties thereof; or that the defendant retook such prisoner and had him in the jail from which he escaped, or within the liberties thereof: 3 R. S. 736, § 85; *Drake* v. *Chester*, 2 Com. 473. But a voluntary escape will not be purged by such return or retaking without affirmance by the plaintiff: *Wesson* v. *Chamberlain*, 3 Com. 351. The sheriff may show by way of defence that the defendant was not liable to arrest: *Phelps* v. *Barton*, 13 Wend. 68; *Ray* v. *Hogeboom*, 11 John. 433; *Carpenter* v. *Willett*, 1 Keyes 510. But when once in custody, such privilege cannot be pleaded in bar to an action for escape: *Gill* v. *Miner*, 13 Ohio St. 182. Neither can the sheriff take notice of an attorney's privilege after he has once arrested him: *Secor* v. *Bell*, 18 John. 52. It is not a sufficient answer to an escape that the jail and jail guard are defective: *Green* v. *Hern*, 2 P. & W. 167.

It is no defence in an action for an escape that execution was

issued against the body before one against the property of the prisoner had been issued and returned: *Renick* v. *Orser*, 4 Bosw. (N. Y.) 384. Neither is it a defence to an action for an escape of a prisoner duly admitted to the jail liberties, that there was a prior escape, if it appears that the prisoner voluntarily returned into custody and continued there until the second escape, and it does not appear that the plaintiff had any notice of the first escape before the return of the prisoner into custody, and although the action was brought more than a year after the first escape, and the defendant pleads the Statute of Limitations: Id. Neither is it a defence that the party was illegally held in custody: *Carpenter* v. *Willett*, 6 Bosw. (N. Y.) 25. Nor yet that the jail was insufficient: *Richardson* v. *Spenser*, 6 Ohio 13; *Commonwealth* v. *Butt*, 2 Id. 348; S. P. *Kepter* v. *Barker*, 13 Ohio St. 177; *Smith* v. *Hart*, 1 Brev. (S. C.) 146. If a sheriff, having final process in his hands, has an opportunity, but fails, to arrest a debtor, and afterwards debtor absconds, the sheriff is liable for the amount of execution and interest, and cannot show the insolvency of the debtor in mitigation of damages: *Goodrich* v. *Starr*, 18 Vt. 227. It is also a good defence that the creditor or his agent procured an escape by a fraudulent device practised on the prisoner: *Dexter* v. *Adams*, 2 Den. (N. Y.) 646.

By 3 R. S., §§ 6 and 7, "any sheriff or other officer who shall have arrested any prisoner in any county may pass over, across and through such parts of any other county or counties as shall be in the ordinary route of travel from the place where such prisoner shall have been arrested to the place where he is to be conveyed and delivered, according to the command of the process by which such arrest shall have been made. Such conveyance shall not, in any case, be deemed an escape; nor shall the prisoner so conveyed, or the officers having him in their custody, be liable to arrest on any civil process while passing through such other county or counties."

The pleading of this statute would, under such a state of circumstances, be a good defence to the action. Also, should the execution or judgment be void, the sheriff will not be liable for an escape: *Austin* v. *Fitch*, 1 Root (Conn.) 288, but might plead in bar to the action. After a voluntary escape plaintiff sues sheriff, the prisoner is subsequently retaken by sheriff, but is not deemed in custody under plaintiff's action, and if he again escapes

plaintiff cannot bring a second action: *Littlefield* v. *Brown* (Sup. Ct. 1828), 1 Wend. 398; 7 Id. (Sup. Ct. 1831) 454, affirmed in Court of Error 1833.

2. *Recapture.*—If a prisoner in execution escape without the assent of the sheriff, &c., and he make fresh pursuit and retake him before an action brought against him, this shall excuse the sheriff: Cro. Jac. 657; Jon. 144; Rol. Abr. 808; and a voluntary return of the prisoner, before action brought, is equal to a retaking upon fresh pursuit: *Bonafons* v. *Walker*, 2 Term R. 126. But if he retake him after the action commenced against him, this shall not excuse him, nor can it be pleaded to an action that was well attached before: Rol. Abr. 808, 809; W. Jones 145; *Harvey* v. *Reynell*, Cro. Jac. 657 (2 Strange 873; *Stonehouse* v. *Mullins*, S. P.); 3 Bacon Abr. 419. If an escaped debtor arrested on mesne process, upon being recaptured is rescued either by himself or others, the officer is not liable in an action for the escape: *Whitehead* v. *Keyes*, 1 Allen (Mass.) 350. If a man taken in execution be rescued, he may be retaken, or a *scire facias* lies against him: Cro. Car. 240. If, however, the sheriff permits a voluntary escape with consent of the plaintiff, the debtor never can be retaken by the sheriff or the plaintiff: Show. 174; 2 Leo. 119.

3. *Void process of commitment.*—Where the sheriff suspends proceedings on the production of an insolvent's discharge to the defendant, he incurs the peril of an action if the discharge turns out to be void: *Orange County Bank* v. *Dubois*, 21 Wend. 351 (Bond. Inst., vol. 2, p. 550). But the discharge of a prisoner on *habeas corpus* by a Supreme Court commissioner, though erroneous, was held a complete bar to an action for an escape: *Wiles* v. *Brown*, 3 Barb. 37; the court having jurisdiction, though the proceedings were irregular. But where by statute a county court judge can only discharge an insolvent in court, the discharge of one out of term is void for want of jurisdiction, and if the prisoner is discharged in pursuance thereof it will be an escape. A writ of error only stays proceedings; it does not authorize the discharge of a prisoner in execution, and if the sheriff does discharge him it will be an escape: *Sherrill* v. *Campbell*, 21 Wend. 287. A defendant being in custody of the sheriff upon a void writ, another writ is lodged against him by the same party, but the first writ being void he cannot be detained upon the second process at the suit of the same party. But if the first arrest is only irregular the defendant is not privileged from being

detained at the suit of another party, unless there be some collusion: Watson 91.

4. *Irregular process.*—It is no defence to an action for the escape of a prisoner in execution that the *ca. sa.* was irregularly issued without a previous *fi. fa.*: *Scott* v. *Shaw*, 13 Johns. 378; *Hinman* v. *Brees*, Id. 529; *Bissell* v. *Kip*, 5 Id. 89; *Ontario Bank* v. *Hallett*, 8 Cowen 192; *Jones* v. *Cook*, 1 Id. 309, *g.*

If A. obtains judgment against B., and a year afterwards, without any *scire facias*, takes out a *capias ad satisfaciendum*, upon which B. is taken, and the sheriff lets him go at large, this is an escape, for though the award of the *capias* after the year without a *scire facias* was erroneous, yet the sheriff could not take advantage thereof, for it was sufficient authority for him to make the arrest, and might have been pleaded by him in an action of false imprisonment: Cro. Eliz. 188 (*Bushe's Case*); *Shirley* v. *Wright*, 2 Ld. Raym. 775; 1 Salk. 273; 2 Id. 700, s. p. adjudged (3 Bac. Abr. 392). Indeed it seems agreed as a general rule, that wherever a sheriff or other authority has a person in custody by virtue of an authority from a court having jurisdiction over the matter, the officer cannot judge of the validity of the process, and, therefore, cannot take advantage of any errors in them. But if the court had no jurisdiction in the matter, then all is void, and an escape upon such void authority is not actionable. This distinction has been laid down in Moore 274, Dyer 175, Poph. 202, Leon. 30 and numerous other cases. See also 3 Bac. Abr. 392. Where upon a recognisance in chancery the conusee sued out execution by a *capias ad satisfaciendum* by force, whereof the conusor was taken and escaped, the court held that though the *capias* in this case was erroneously awarded, yet it was a good execution as long as it continued unreversed, and, consequently, the sheriff liable for an escape: *Coniers, Sheriff of Durham's Case*, Cro. Eliz. 576; *Ognell* v. *Paston*, Id. 165; Moore 274, and 2 Leon. 84, s. c. and s. p. 8 Co. s. c., cited *Leighton* v. *Garmons*, Cro. Eliz. 707, s. p.

Where the sheriff is ordered by a writ of *habeas corpus* to bring up the body of a prisoner in execution, if it is valid on its face, though irregularly or erroneously allowed, the sheriff will be protected in his obedience to it: *Noble* v. *Smith*, 5 Johns. 357; *Wattles* v. *Marsh*, 5 Cow. 176.

An irregularity in the process, which does not render it void, but voidable only, will not excuse an escape: Watson 139; *Hinman*

v. *Brees*, 13 John. 529; *Scott* v. *Shaw*, Id. 378. Thus a wrong title in the name of the chief justice has been held not such an irregularity as would excuse the sheriff for not executing such process: *Ross* v. *Luther*, 4 Cow. 188; *Hutchinson* v. *Brand*, 6 How. 73; 5 Seld. 208, s. c. *The President, &c., of Ontario Bank* v. *Hallett*, 8 Cow. 192; *Scott* v. *Shaw*, 13 John. 378. The sheriff in fact can never allege error either in the judgment or process as an excuse for an escape: *Hutchinson* v. *Brand, supra; Stoddard* v. *Turbell*, 20 Vt. 321; *Woodruff* v. *Barrett*, 15 N. J. L. (3 Green) 40: *Stevenson* v. *McLean*, 5 Humph. (Tenn.) 332.

5. *Discharge by order of court.*—If a constable, who has a defendant in execution, discharge him by order even of the justice who issued the execution, but who has no authority from the plaintiff, the constable will be liable for an escape: *Van Slyck* v. *Taylor*, 9 John. 146. But the discharge of a prisoner on *habeas corpus* by a Supreme Court commissioner, though erroneous, was held a complete bar to an action for an escape, the court in this case having jurisdiction: *Wiles* v. *Brown*, 3 Barb. 37. In *Saffrey* v. *Jones*, 2 B. & Ad. 598, it was held to be a good defence to an action against a sheriff or jailer for an escape, that he discharged the prisoner from custody by virtue of an order of the insolvent debtor's court; and it was not necessary for him to show that the proceedings upon which the order was grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge. A sheriff is not liable for arresting or detaining a debtor, who has executed a deed of assignment under the English Bankruptcy Act of 1861, sect. 192, after production of a certificate of registration; the debtor's remedy being by application to the court or a judge for his discharge from custody: *Ames* v. *Waterlaw*, Law Rep. 5 C. P. 53; 39 L. J. C. P. 41. On the other hand, B. was, on the 3d of August, served with a writ under the Bills of Exchange Act at the suit of A., and on the 5th, he executed a composition deed which was registered on the 13th. On the 15th judgment was signed for non-appearance to the writ, and a *ca. sa.* issued on the 25th of September, under which he was arrested. The sheriff having notice of these facts, released him from custody on being shown the certificate of registration of the deed: *Held*, that the sheriff was liable for an escape: *Allen* v. *Carter*, Law Rep. 5 C. P. 414; 39 L. J. 212; 22 L. T. N. S. 586.

A debtor arrested on mesne process brought himself by *habeas*

*corpus* before a judge, by whom he was committed to the custody of the marshal. Shortly afterwards he filed his petition to the insolvent debtor's court for his discharge, and that court ordered that he should be discharged as to the creditor's debt as soon as he should have been in custody fifteen months. On this he returned to the marshal's custody and while there was brought by a *habeas corpus cum causa* before the Central Criminal Court, to plead to an indictment. He pleaded not guilty, and traversed to the next sessions, but as he could not give bail as required, that court committed him to Newgate until discharged in due course of law. Subsequently he was bailed; whereupon the keeper of Newgate, without any fresh warrant, carried him back to the marshal's custody. After this, and before the expiration of the fifteen months, he escaped. In an action against the marshal for an escape: *Held*, that his charge ceased when he brought the prisoner before the Central Criminal Court; and that as it had not been revived by any fresh warrant of commitment, the custody of the prisoner at the time was illegal; that the marshal therefore was not liable, and that his conduct in receiving the prisoner did not stop him from saying that he had no right to detain him: *Contant* v. *Chapman*, 2 G. & D. 191; 2 Q. B. 771; 6 Jur. 666.

Where an execution creditor is willing to allow a debtor to go out of prison for a temporary purpose, the custody continuing, the sheriff may refuse unless ordered by a rule of court; but if, without any rule of court, all parties agree to the debtor leaving prison and from a laxity of surveillance of the sheriff's officers the debtor escapes, it is a question of fact for the jury, if the judgment creditor brings an action against the sheriff, whether the judgment creditor did not himself contribute to the escape: *Haines* v. *East India Co.*, 11 Moore P. C. C. 39.

The marshal of the King's Bench prison was not liable for an escape in obeying the warrant of commissioners of bankruptcy in bringing before them a bankrupt confined in his custody charged in execution, in order to be examined on the second day of the meeting of the commissioners, though it was not the last day of examination: *Spence* v. *Jones*, 1 D. & R. 377; 5 B. & Ald. 705.

A bankrupt having escaped out of the custody of the marshal, and being at large, surrendered to a commission subsequently issued, and received the protection conferred by 3 Geo. 2, c. 30, s. 5:

*Held*, that he might, notwithstanding, be retaken and detained in custody by the marshal: *Anderson* v. *Hampton*, 1 B. & Ald. 308.

6. *Rescue.*—A rescue is no excuse for a jail-keeper bringing up a prisoner by *habeas corpus*, charged with wilful and voluntary escape: *O'Neal* v. *Marson*, 5 Burr. 2812. A rescue before commitment, of one arrested upon mesne process, subjects the rescuers, and not the officer who made the arrest, to an action by the creditor: *Cargill* v. *Taylor*, 10 Mass. 206. But the rescue before commitment is no excuse for the officer, where the arrest is by virtue of an execution: Id. A prisoner in custody, charged in execution upon a final process, being allowed the liberty of the jail, was arrested on criminal process, and taken to and imprisoned in another county: *Held*, that the sheriff was liable for an escape; he was bound, whether bail for the limits had been given or not, to prevent the rescue: *Brown* v. *Tracy*, 9 How. (N. Y.) Pr. 93. If a mob riotously and by force demolishes a jail, by which the debtors escape, the sheriff or jailer is answerable to the creditors for their escape: *Elliott* v. *Duke of Norfolk*, 4 T. R. 789. In an action for an escape, though the escape was without the knowledge of and without any fault whatsoever on the part of the jailer, he can in such case avail himself of nothing but the act of God, or the king's or country's enemies, as an excuse: *Alsept* v. *Eyles*, 2 H. Bl. 108; *Fairchild* v. *Case*, 24 Wend. 381; *Rainey* v. *Dunning*, 2 Murph. (N. C.) 386; *State* v. *Halford*, 6 Rich. (S. C.) 58.

7. *Bonds for prison bounds or jail limits.*—The jailer may suffer the debtor to have the liberty of the prison rules, without taking a bond and security from the prisoner not to depart; and so long as the prisoner keeps within the rules no action lies against the jailer as for an escape: *Steinman* v. *Tabb*, 3 Bibb 202. An escape made from necessity, and without the consent of the debtor, as by being carried out of the jail in a fit of sickness, does not violate the condition of a bond given to obtain the liberty of the yard: *Baxter* v. *Taber*, 4 Mass. 361. But see *Cargill* v. *Taylor*, 10 Id. 206. A debtor is restricted to the limits fixed by law for the time being, and is guilty of an escape if he transgress those limits, though they were more extensive at the time he made the bond: *Reed* v. *Pullum*, 2 Pick. (Mass.) 158. Where a debtor imprisoned on execution was admitted to the liberties of the yard, upon giving a bond, with a surety, approved by only one justice of the peace, the jailer was held liable for an escape, the bond not being

conformable to the statutes of Massachusetts of 1784 and 1811, under which it is necessary that the surety be approved by the creditor, or by two justices of the peace, one being of the *quorum*: *Whitehead* v. *Varnum*, 14 Pick. (Mass.) 523. But if a bond has been given with two sufficient sureties, although the sureties have not been approved by two justices of the peace, nor yet by the creditor, such is not an escape according to statute in New Hampshire: *Tappan* v. *Bellows*, 1 N. H. 100.

Where a prisoner, having the jail liberties, went beyond the limits on a Sunday, returning in the evening: *Held*, that this was not a voluntary or negligent escape, the sheriff having no power to restrain him; yet that it was not such an escape as under the New York statutes could be purged by return before action brought, and that the sheriff was liable in the first instance, he having his remedy on his bond, that not being assignable: *Tillman* v. *Lansing*, 4 John. 45. A bond for the limits, given by the defendant, who had been charged in the execution and to whom the plaintiff had previously given permission to go where he pleased, does not revive the judgment so that an action can be maintained against the sheriff for an escape: *Powcher* v. *Holley*, 3 Wend. 184. A debtor on the prison bounds has a right to go anywhere within the jail limits that other persons have, who are not confined to such limits: *Lurky* v. *Brandon*, 1 Ohio 49. Where the jail limits include the whole of a county, and after a prisoner is charged in execution, a part of the county is set off to a new one, such prisoner has the privilege of the limits of the old county: *Kent* v. *Burnett*, 10 Ohio 392.

In Pennsylvania it is not an escape to allow a prisoner the liberty of the jail yard: *Green* v. *Hern*, 2 P. & W. 167. In Rhode Island the doctrine as to escapes is that of the common law, and the statutes giving the limits to prisoners have not altered the common law: *Steer* v. *Field*, 2 Mason 486. And at common law a jailer is not liable for an escape in allowing prisoners, confined for debt, the liberty of all the apartments within the walls of the jail; the confinement within the walls is *salva et arcta custodia*: Id. But to admit a prisoner to the liberties, except in the cases expressly provided by statute, in Vermont, renders the jailer liable for an escape: *Leonard* v. *Hoyt*, Brayt. 73. In an action on bond for the limits it is a good plea in bar that the prisoner had been discharged as an insolvent and then the sheriff liberated him:

*Hayden* v. *Palmer*, 2 Hill 205; s. c. 7 Id. 385. Going beyond the liberties without necessity is an escape: *Bissell* v. *Kip*, 5 John. 89.

Where a debtor in *ca. sa.* gives a bond under the Prison Bounds Act and escapes beyond the limits, but remains in the county, the sheriff is not liable for not re-arresting and committing him at the expiration of the six calendar months. The creditors' remedy is upon the prison bound bond: *Gunn* v. *Davis*, 26 Ga. 169. Where the defendant, who had given bond for prison bounds, goes without the limits, and the plaintiff afterwards sues out a second execution for an escape and imprisons the defendant, it shall exonerate the security to the bond given to the sheriff: *Osborne* v. *Bowman*, 2 Bay 208.

The sheriff is answerable for the solvency of the security taken under the Prison Bounds Act, and though the security was good when taken, the sheriff is liable to the plaintiff: *Clarke & Co.* v. *Moore*, 1 Tr. Con. Rep. 150. See also *Yates* v. *Yeadon*, 4 McCord 18. Where party has given security for prison bounds, and escapes, sheriff can retake him and put him into a state of confinement: Id.

In Indiana, if an execution debtor escape from prison bounds, the bond for the limits is forfeited and his subsequent return to the bounds, before commencement of suit on the bond, is no defence to such suit: *Shader* v. *Frost*, 4 Blackf. 190. And an action for debt lies against the sheriff for an escape on execution, the English statutes being in force in Indiana: *Gwinn* v. *Hubbard*, 3 Blackf. 14.

In Georgia a sheriff is not liable for not recommitting at the end of six months a debtor arrested under a *ca. sa.*, who has given bonds under the Georgia Act of 1820 to take the prison bounds and has broken the bond by going beyond the prison limits: *Gunn* v. *Davis*, 26 Ga. 169.

A sheriff has no control over the body of a debtor after he has given bond for the liberty of the yard, except in cases specified in the Maine Act of 1822, c. 209: *Codman* v. *Lowell*, 3 Me. (3 Greenl.) 52. By New York Act of 1801, if a prisoner who has given bond for the liberties, voluntarily goes beyond them, his bond is forfeited, and the sheriff may retake him on fresh pursuit and recommit him to custody: *Jansen* v. *Hilton*, 10 John. 549; *Barry* v. *Mandell*, Id. 563. If the sheriff permits the prisoner to have the liberty of the yard on his giving bond, according to law,

for "double the sum for which he was imprisoned," if such sum does not include the officer's fees for the commitment, it is sufficient, and such officer is not liable in debt for the escape: *Gordon* v. *Edson*, 2 N. H. 152.

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## MICROSCOPICAL EXAMINATIONS OF BLOOD IN ITS RELATION TO CRIMINAL TRIALS.

IT was the endeavor of the author in the articles published in this magazine for October 1876, and for May 1877, to show to the profession what amounted to a demonstration to his own mind at the time that the red blood corpuscles of other animals could be distinguished from those of man by a system of measurement therein set forth.

This conclusion was arrived at by an extended series of experiments upon different kinds of mammalian blood, and also of that of some other species of animals.

Since the above articles were written, a year has passed away, and the author has continued his observations in the same direction, making a large number of experiments, as enumerated below. This paper still further illustrates the certainty of these conclusions, and also what is of scarcely less importance in criminal trials, the practicability of transferring blood corpuscles from hard opaque substances, and of being able to identify and distinguish them in the same manner as in the case of those received directly on glass.

Blood corpuscles when drying on surfaces on which they do not slide or contract during the process, preserve their areas unchanged; and with the serum form a coat or thin glaze which is quite hard and brittle. In the process of transferring them from the substances on which they are received to the glass slide on which they are to be examined by means of the microscope, they mostly separate from the serum, as shown in plate 1, post, page 556. Under these conditions, unless some watery fluid, or other agent is brought to act upon them, they retain their form with as much certainty as they would if they were constituted of glass or metal.

By my present method of working I do not allow any substance to come in contact with the dried corpuscles which can exert the least influence upon them either to enlarge or contract their area.